

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: December 14, 2020
TO: Honorable Mayor and Councilmembers
FROM: City Attorney
SUBJECT: Legal Update: Assembly Bill 992—the Brown Act and Social Media

INTRODUCTION

On August 31, 2020, Governor Gavin Newsom signed Assembly Bill 992 (AB 992) into law. AB 992 amends the Ralph M. Brown Act (Brown Act) to address social media platforms. AB 992 clarifies that members of a legislative body may participate in conversations with the public using social media platforms subject to certain restrictions consistent with the Brown Act.¹

BACKGROUND

The Brown Act was adopted in 1953 to “aid in the conduct of the people's business” by requiring that legislative bodies’ “actions be taken openly and that their deliberations be conducted openly.” Cal. Gov’t Code § 54950. It provides:

A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

Cal. Gov’t Code § 54952.2(b)(1). Communications among a majority of members, or through their staff or other intermediaries, outside of an open and public meeting concerning matters within the legislative body’s subject matter jurisdiction, are unlawful unless a Brown Act exception exists.² Exceptions include participation in conferences, local community meetings, ceremonial events, and committee meetings of the body, so long as the members of the legislative body refrain from discussing business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency. Cal. Gov’t Code § 54952.2(c).

¹ AB 992 applies to all members of City bodies subject to the Brown Act, including councilmembers and members of City advisory boards and commissions.

² “The Brown Act prohibits all serial communications, except for the noted exceptions, regardless of whether members of the legislative body reach a consensus; any discussions within the legislative body’s jurisdiction constitute “communications.” See City Att’y MS 2015-25 (Nov. 20, 2015). Additionally, staff conversations through intermediaries may constitute impermissible serial communications. *Id.*

Before AB 992, these exceptions failed to specifically address the growing popularity of social media platforms as a method of communicating with the public – a method that has increased in popularity during the pandemic. As a result, many members of legislative bodies were hesitant to engage in communication with constituents via social media for fear of violating the Brown Act. *See* Assem. Com. on Local Government, Analysis of Amend. to AB 992 (2019-2020 Reg. Sess.) as amended July 31, 2020. The authors of AB 992 believe the use of social media as a communication mechanism furthers the Brown Act’s purpose of conducting the people’s business openly. *Id.*

ANALYSIS

AB 992 adds new language to the Brown Act that permits certain social media communications. Specifically, the bill adds Government Code section 54952.2(b)(3), providing, in relevant part, that the Brown Act does not prohibit:

. . . a member of the legislative body from engaging in separate conversations or communications on an internet-based social media platform to answer questions, provide information to the public, or to solicit information from the public regarding a matter that is within the subject matter jurisdiction of the legislative body provided that a majority of the members of the legislative body do not use the internet-based social media platform to discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body. . .

Cal. Gov’t Code § 54952.2(b)(3)(A).^{3 4} Members of a legislative body *cannot* respond directly to communications or comments posted or shared from other members of the body, including using digital icons expressing reactions, such as a “Like” button on Facebook, as a serial meeting may inadvertently occur. Cal. Gov’t Code § 54952.2(b)(3)(B). Furthermore, members of a legislative body who communicate on matters within the body’s jurisdiction using online social media services should ensure those services are open and accessible to the general public, free of charge, and do not require approval for participation from the social media site or other third party.⁵ *Id.* We are attaching a document with frequently asked questions about AB 992 to assist Councilmembers using social media.

³ The bill specifies that the new provision will only be in effect until January 1, 2026. This sunset provision was added to the bill to ensure that the legislation “achieves the right balance between constitutional and statutory public access requirements and the free flow of communication” and to provide the opportunity to determine whether additional legislation is needed to achieve that balance. Sen. Com. on Rules, Analysis of AB 992 (2019-2020 Reg. Sess.) as amended July 31, 2020.

⁴ While allowing replies and posts to constituents and other outside parties on social media, AB 992’s protections only permit those communications under the Brown Act. Members of bodies that hear quasi-judicial matters must also ensure that they do not show bias to any party in social media communications. *See* Memorandum from K.M. Halsey, Deputy City Attorney, City of San Diego, to Hon. Councilmember Scott Sherman, City of San Diego (Feb. 22, 2013) (on file with Office of the City Attorney).

⁵ However, members of a legislative body may use a social media service that merely reserves the right to block or remove users who violate site protocols or rules. Cal. Gov’t Code § 54952.2(b)(3)(B).

California Assembly Bill 992 Frequently Asked Questions

Q: Can I reply to a constituent question with a public post on Facebook?

A: Yes, as long as the response isn't posted on another councilmember's page and other councilmembers don't respond or "like" or share.

Q: Can I reply to another councilmember's public post on Facebook?

A: No. AB 992 specifically prohibits responding directly to another member on an internet-based social media platform.

Q: Can I like another councilmember's public post on Facebook?

A: No. AB 992 specifies that "likes" or other reaction icons are prohibited "discussion among" the members of the body.

Q: I am a member of a Facebook group whose members can join only after they are approved by the moderators. Can I reply to a constituent question posted on this group's Facebook page?

A: No. Forums or groups on otherwise open social media sites where membership is approved by another person do not meet the AB 992's definition of "open and accessible." Replying to a constituent concern in a private group could be considered a Brown Act violation, even if no other councilmember replies or likes the response.

Q: Can I make a post on the wall of a Facebook group?

A: No, since AB 992 offers no protection for non-public groups.

Q: Can I answer a constituent question on a public post on Nextdoor?

A: No. Nextdoor requires members to verify their address to be approved for the platform, which likely does not meet AB 992's definition of "open and accessible."

Q: I am an avid birdwatcher. I am a member of a group on reddit that requires moderators to approve new members. Can I post my bird pictures on the group's page?

A: Yes. A personal post in a private group does not violate the Brown Act if it does not concern the legislative bodies' business.